GOING FOR THE JUGULAR VEIN: ARRESTS AND ATTACHMENTS IN ADMIRALTY

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The author discusses the legal and practical aspects of admiralty seizures in rem and attachments incident to action in personam. Presented in detail are the requirements for issuance of process, types of property which can be the subject of arrest or attachment, and methods of seizure. Also analyzed are the important methods available to a defendant to obtain release of seized property and his defenses and countermeasures to arrest and attachment.

Scene: The chart room of an admiralty law office high above Cleveland Harbor on a late Saturday afternoon. Seated on a stool, the senior proctor reads from a sheaf of documents and makes measurements on the chart with dividers. For a brief moment he smiles with wicked satisfaction and then, turning to a junior proctor, he hands him the documents and speaks rapidly: "File them. Seize the felon. Sails at midnight. Pier 26. Clerk ready. Monition to the marshal. No court order necessary. Utmost secrecy—muffled oars. Plaster him good and stay there. No bond possible 'til Monday. Aha, Aha, some quiet London gardens will reverberate this weekend. You understand me perfectly? Manucaption at midnight. Delightful, Delightful."

In another setting this scene and the midnight arrest it foreshadows would, if the "felon" were a natural person, "shock the conscience" of the court and "offend the community's sense of fair play and decency" because of the "ignoble short cut" of legal process and "the stealthy encroachment" on the constitutional rights of the citizen.[1] However, we are not here concerned with the fourth amendment's prohibition against unreasonable searches and seizures or with seizures or arrests under criminal law, but with the civil remedies of arrest and attachment under admiralty law.

In the setting of admiralty law, the "felon" which we have pictured is, of course, not a natural person, but a ship personified as a wrongdoer.[2] The scene portrays nothing more than a thoroughly professional and ethical pursuit of one of the two most drastic remedies known to modern civil law; that is, arrest of property by an admiralty proceeding *in rem*. The other drastic remedy is attachment of property by an admiralty proceeding *in personam*.

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1 Mapp v. Ohio, 367 U.S. 643 (1961).

2 See Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224 (1945).

These remedies are drastic because: (1) no court order is necessary for issuance of process; (2) no personal service on the defendant is required; (3) no bond to answer for a wrongful seizure is required of the plaintiff; (4) before adjudication of liability or damages, a bond for twice the amount of the claim may be required from the defendant for release of the property; and (5) before adjudication of liability the property, if not released by bond, may be sold under certain conditions.

Despite these and other strictures peculiar to each remedy, the courts have generally commended these procedures as being supported by long established custom and public policy and have interpreted the remedies with great liberality.

I. Description of the Remedies

The action *in rem*[3] is brought by arrest of maritime property in which plaintiff has acquired a lien under maritime law,[4] or when a lien is created by statute.[5] The property is the named defendant, and damages cannot exceed the value of the property. Seizure *in rem* is allowed even if suit against the person could be brought in the district; the rule provides that a party "who may proceed *in rem* may also, or in the alternative, proceed *in personam* against any person who may be liable."[6]

The action *in personam*, with prayer for attachment,[7] is brought by assertion of a maritime claim and by attachment of defendant's property following an affidavit by plaintiff that defendant cannot be found in the district. In this case a person is the named defendant, but damages cannot exceed the value of the property attached. Attachment is not permitted when by a good faith effort defendant may be "found"

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[3] See Fed. R. Civ. P., Adm. Supp. C.

[4] The common law of the sea as distinguished from statutory law. See Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959). See *infra* note 44.

[5] Ship Mortgage Act, 41 Stat. 1000 (1920), 46 U.S.C. §§ 911-84; Federal Maritime Lien Act, 41 Stat. 1006 (1920), 46 U.S.C. §§ 971-975; Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. § 761; Vessel of Panama Canal Co., 41 Stat. 525 (1920), 46 U.S.C. § 741; Forfeiture Statutes, 1 Benedict, Admiralty § 113 (6th ed. 1940), citing 28 U.S.C. § 41(a) (now 62 Stat. 934 (1948), 28 U.S.C. § 1355); § 115 citing 28 U.S.C. § 106 (now 62 Stat. 936 (1948), 28 U.S.C. § 1395). A state statute creating a lien may be enforced *in rem* in federal court (and in Federal Court only) if (a) the vessel is a "domestic" vessel, (b) the claim giving rise to the lien is a maritime claim, and (c) maritime law or a federal statute does not create such a lien. State statutes creating non-maritime liens may be enforced in state courts against domestic or foreign vessels. 1 Benedict, Admiralty (6th ed. 1940) §§ 87-88.

[6] Fed. R. Civ. P. Adm., Supp. C(1)(b).

[7] Fed. R. Civ. P. Adm., Supp. B.

within the district.[8] There is no requirement that plaintiff have a maritime lien on the property attached.

The action *in rem* is exclusively with the admiralty jurisdiction, so it need not be identified in the pleadings as an admiralty or maritime claim,[9] although it is prudent to do so. However, the action *in personam* with clause for attachment may present a situation of dual jurisdiction;[10] therefore, if plaintiff desires to invoke the admiralty jurisdiction, he must specifically do so in the pleadings.[11] The chief characteristic of the "admiralty side" of the court is that, with a narrow exception,[12] trial is by the court without a jury.

II. The Supreme Court's View

Approbation of these procedures by the Supreme Court is found in the fact that they were, for over a hundred years, authorized by the Supreme Court Rules although they were not specifically authorized by any statute.[13] They are now authorized by the Federal Rules of Civil Procedure, as amended by the Supreme Court, effective July 1, 1966, whereby the civil and admiralty procedures were unified and the former Admiralty Rules of the Supreme Court were rescinded.

In regard to the remedy of attachment, the Court long ago confirmed its authority to promulgate former Admiralty Rule 2 which allowed the acquiring of personal jurisdiction over a non-resident defendant by attachment of his property within the district. The Court held that Rule 2 did not violate a prohibition in the Judiciary Act of 1789[14] against the bringing of a civil action against an inhabitant of

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8 See discussion if "found," *infra*.

9 Fed. R. Civ. P. 9(h).

10 The maritime remedy of attachment permitted by supplemental rule B can only be pursued within the admiralty jurisdiction. "In addition, or in the alternative," however, rule B permits plaintiff to invoke attachment remedies under state law. By virtue of the so-called "saving clause," 28 U.S.C. § 1333, 63 Stat. 101 (1949), a maritime claim (as distinguished from a maritime remedy) may be brought on the "law" side of the court, when independent grounds for "law" jurisdiction exist. Thus a claim which invokes a state created attachment remedy, which shows diversity of citizenship and the jurisdictional amount, but which by nature is a maritime claim, presents a situation of dual jurisdiction. *Cf.* Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303 (1915).

11 *Supra* note 9.

12 Great Lakes Jury Statute, 28 U.S.C. § 1873, 62 Stat. 953 (1948).

13 Miller v. United States, 78 U.S. 268, 297 (1870). Ultimate authority for these procedures rests either upon the Supreme Court's rule making power, Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265 (2 Cir. 1929) or upon the constitutional grant of admiralty jurisdiction as implemented by statute, Manro v. Almeida, 23 U.S. 473 (1825); Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635 (1924).

14 28 U.S.C. § 1391 (1963).

the United States in a district other than where he resides.[15] Sixteen years later the Court again upheld the procedure of foreign attachment, saying:

> To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which . . . his goods or credits [might be] attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice.[16]

The high favor in which the remedy of foreign attachment is held is further shown by the Court's action in 1950 in *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*[17] There a vessel, alleged to be owned by the same company that owned a vessel on which plaintiff's cargo had been lost, was seized in the Canal Zone under process of attachment. Just prior to the filing of suit, title to the vessel had been transferred to another corporation recently organized by the vessel owner. The district court dissolved the attachment on the ground that defendant had no title in the property and that an admiralty court had no jurisdiction to inquire into the circumstances of the transfer. The Supreme Court, without dissent, reversed and remanded on the grounds that admiralty may grant equitable relief upon issues collateral to a maritime cause of action, that admiralty may protect its jurisdiction from being thwarted by a fraudulent transfer of property, and that "the importance of the right to proceed by attachment to afford security has been emphasized."[18] The Court, speaking through Justice Frankfurter, said:

> The process of foreign attachment is known of old in admiralty. It has two purposes: to secure a respondent's appearance and to assure satisfaction in case the suit is successful . . . .[19]

On the other hand, there have been few policy pronouncements by the Supreme Court in regard to the remedy of arrest of property in an *in rem* proceeding. Perhaps this is because the right to an *in rem* remedy and the right under substantive maritime law to a maritime lien are so interdependent[20] that the remedy, as well as the substantive

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[15] Atkins v. Disintegrating Co., 85 U.S. 272 (1873).

[16] *In re* Louisville Underwriters, 134 U.S. 488, 493 (1889).

[17] 339 U.S. 684 (1950).

[18] *Id.* at 698.

[19] *Id.* at 693.

[20] "The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise." The Rock Island Bridge, 73 U.S. 213, 215 (1867); 1 Benedict, *supra* note 5, §§ 11-12.

right to a lien, is included within the constitutional grant of admiralty jurisdiction.

Twice in recent years the Court has discussed the *in rem* remedy. In *Canadian Aviator, Ltd. v. United States*[21] the Court, through Justice Reed, spoke approvingly of this remedy:

> The use of the phrase "caused by a public vessel" constitutes an adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship. Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court . . . .[22]

Fifteen years later, in *Continental Grain Co. v. Barge FBL-585*,[23] the Court considered the *in rem* remedy in a different context. The change of venue statute allows, for purposes of convenience, the transfer of "any civil action to any other district or division where it might have been brought."[24] A ship had been seized in an action *in rem* and her owner had been sued *in personam* in the Eastern District of Louisiana. Motion of the shipowner was granted to transfer venue to the Western District of Tennessee where the owner was subject to service, but where the vessel could not have been arrested. The Supreme Court affirmed the transfer on the ground that for the purpose of the change of venue statute, only a single civil action had been brought (the *in personam* action) which was transferable to a district where the shipowner could be served with process, and that the *in rem* action against the ship should be disregarded in the "dry-land context of *forum non conveniens*"[25] as being a useless fiction. The Court referred to the "longstanding admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment,"[26] and referred to critics who called the fiction "an animistic survival from remote times," "irrational" and "archaic."[27]

Yet, it is clear that the Court in *FBL-585* did not mean to go be-

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21 324 U.S. 215 (1945).

22 *Id.* at 224.

23 364 U.S. 19 (1960).

24 28 U.S.C. § 1404(a), 76A Stat. 699 (1962).

25 *Supra* note 23, at 23. Justices Frankfurter and Harlan concurred for other reasons. Justices Whitaker and Douglas dissented.

26 *Id.* at 22-23.

27 *Id.* at 23, citing The Carlotta, 48 F.2d 110, 112 (2d Cir. 1931), quoted in Gilmore and Black, The Law of Admiralty 508 (1957).

yond the narrow issue before it because, speaking through Justice Black, it cautioned critics of the fiction:

> Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still.[28]

It should be noted that even within the scope of the *FBL-585* case, the Court did not attack the maritime lien as such which is the basis of the *in rem* remedy. The existence of "that most cherished and characteristic badge—the formidable lien *in rem*"[29] remains an unchallenged doctrine.[30] Instead, the court attacked one aspect of the maritime lien, the personification of the ship as actor, which is only one of several explanations of the lien which have competed for rational acceptance.[31]

A. *Requirements for Issuance of Process*

The former practice required that a libel (complaint) "shall be on oath or solemn affirmation."[32] Since the merger of the Admiralty and Civil Rules, the same requirement exists in regard to a complaint containing a prayer for attachment,[33] or in regard to a complaint *in rem*.[34] In addition, if the complaint contains a prayer for attachment, plaintiff, or his attorney, must give an affidavit that to affiant's knowledge the defendant cannot be found in the district.[35]

In some jurisdictions the former practice also required an order from the court before process *in rem* or for attachment would issue.[36] In the busier admiralty districts, the clerk was empowered to issue process without order of the court,[37] and under the Supplemental Rules the clerk is now so authorized.[38]

There has never been any requirement that the plaintiff seeking to arrest or to attach property in admiralty post bond as security for

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28 *Ibid.*

29 Flowers v. Travelers Insurance Co., 258 F.2d 220, 221 (5th Cir. 1958).

30 Krauss Bros. Lumber Co. v. Dimon S.S. Corp., 290 U.S. 117, 121, 125 (1933).

31 Compare 1 Benedict, *supra* note 5, § 11 (personification of the ship) with § 13 (ship as an instrument of credit); Gilmore & Black, *supra* note 27, 483-510 (1957).

32 United States v. 935 Cases More or Less, 136 F.2d 523, 525 (6th Cir. 1943).

33 Fed. R. Civ. P. Adm. Supp. B(1).

34 Fed. R. Civ. P. Adm. Supp. C(2).

35 Fed. R. Civ. P. Adm. Supp. B(1).

36 Manro v. Almeida, *supra* note 13, at 492 (1825)—attachment; The Berkeley, 58 F. 920 (E.D.S.C. 1893)—Arrest.

37 2 Benedict, *supra* note 5, at 348.

38 *Supra* note 3, B(1)—Attachment; *supra* note 3, C(3)—Arrest.

damages arising from a wrongful seizure,[39] but local district court rules usually require that plaintiff give security for court costs at the time of filing the complaint. Supplemental Rule E(2)(b) gives the court discretion to require any party at any time to give security "for costs and expenses."

Although the general rule in admiralty is that a party is not entitled to recover damages for arrest or attachment of his property merely because the suit has failed on the merits,[40] bad faith or gross negligence by plaintiff in arresting or attaching property will not only result in release of the property, but will subject plaintiff to liability for damages.[41] Furthermore, even though failure of the suit on the merits will not in itself support a claim for damages for wrongful seizure, the unsuccessful plaintiff will be charged with court costs, which can be sizeable if plaintiff has insisted upon a bond for release of the property[42] because the premiums on the bond are normally included in the court costs.[43] Plaintiff may also be required to advance a deposit for the initial custodial expenses of the marshal.[44]

B. *Subject Matter of Arrest or Attachment*

Plaintiff in a suit *in rem* may cause to be arrested any property in which he has a maritime lien.[45] The subject of these liens, and therefore

[39] Brown v. Pan Oceanica Shipping Corp., 182 F. Supp. 730 (D. Md. 1960). In state court practice in a replevin action or attachment proceedings, plaintiff must usually file bond equal to twice the value of the property seized. See Ohio Rev. Code Ann. § 2715.04 (Page 1954).

[40] 2 Benedict, *supra* note 5 § 304.

[41] See Damages for Wrongful Arrest or Attachment, *infra*.

[42] Current annual premiums for release bond or stipulation for value are in the range of $7.50 to $10.00 per $1,000.00 of idemnity up to $100,000.00, and then at a lesser rate.

[43] But premiums for a release bond will not be charged as costs where instead of furnishing a cost free Letter of Undertaking which would have been agreeable to plaintiff, the claimant posts a release bond. Greenwich Marine, Inc. v. S.S. Alexandra, 339 F.2d 901 (2d Cir. 1965).

[44] Fed. R. Civ. P. Adm. Supp. E(4)(e); 28 U.S.C. § 1921, 76 Stat. 417 (1962).

[45] Maritime liens spring into existence as a result of maritime tort, breach of maritime contract, acts of salvage and general average, etc. 1 Benedict, *supra* note 5, at 19. The only common tort situation involving ships which does not give rise to a lien is injury to or death of a seaman caused by his employer's negligence. Then the only remedy is under the Jones Act, 46 U.S.C. § 688, 41 Stat. 1007 (1920), which does not support a lien. Plamals v. S.S. Pinar Del Rio, 277 U.S. 151 (1928). *Cf.* Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964). The only common contract situation involving ships which does not give rise to a lien for a breach is a shipbuilding contract which is not regarded as a maritime contract. 1 Benedict, *supra* note 5, §§ 61-71, §§ 92-98. Speaking generally, a maritime lien does not depend on possession nor on recording, and cannot be divested except by the giving of other security, by judicial sale, or by laches in enforcement. Gilmore and Black, *supra* note 27, at 624.

of seizure, are the privately owned ship,[46] the cargo carried on the ship, and freight monies earned by the ship. Rarely, however, could a single claim support a lien in all of these interests.

The ship, of course, is the most common subject of lien and of seizure, but cargo has often been regarded as itself the contracting thing[47] much in the same way as a vessel is so regarded.[48] The shipowner may cause cargo to be arrested for non-payment of freight, for demurrage, or for general average.[49] However, it should be noted that while these transactions create a maritime lien in cargo, the lien, unlike the usual maritime lien, is lost by an unconditional delivery to the consignee.[50] Possibly even a dog that bites an admiralty lawyer may be sued *in rem*.[51]

The concept of the "offending thing" as supporting a lien against the ship or cargo cannot be applied to real property; thus a bridge which falls on a ship cannot be sued.[52] Appurtenances to a vessel, such as radiotelephone, radio direction finder and fathometer, which are removed before the filing of the complaint against the vessel, are also subject to the seizure, and the court may order their return to the vessel.[53]

The subjects of attachment are broader than the subject of arrest by process *in rem*. Supplemental Rule B provides for attachment of "the defendant's goods and chattels, or credits and effects in the hands of garnishees."[54] There is no requirement that plaintiff have a maritime lien in the property;[55] but, on the other hand, plaintiff's possession of a maritime lien does not prevent attachment.[56] A vessel owned by de-

46 Publicly owned vessels are immune from seizure, at least if owned by friendly powers. Compania Espanola de Navegacion Maritima, S.A., v. The Navemar, 303 U.S. 68 (1938).

47 And, no doubt, the "offending thing."

48 Sprague and Healy, Cases on Admiralty 228, n.24 (1950); Healy and Currie, Cases and Materials on Admiralty 149 (1965).

49 Healy and Currie, *supra* note 48.

50 4885 Bags of Linseed, 66 U.S. 108 (1861).

51 In The Lord Derby, 17 Fed. 265 (E.D. La. 1883), the pilot was bitten by a dog kept in the master's cabin. He brought suit *in rem* against the vessel. The court presented, but did not discuss, an alternative basis for recovery; namely, a suit *in rem* against the dog, for, said the court, "It [the dog], was part of the cargo." 17 Fed. at 266.

52 The Rock Island Bridge, *supra* note 20, at 216. *Cf.* The Arkansas, 17 F. 383, 386 (S.D. Iowa 1883).

53 Nelson v. Oil Screw Arctic, 1956 A.M.C. 502 (W.D. Wash. 1956); but *cf.* San Diego Trust & Savings Bank v. Oil Screw Linda Lee, 1949 A.M.C. 324 (S.D. Calif. 1947).

54 *Supra* note 7, B(1).

55 Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303, 307 (1915).

56 In Brown v. C. D. Mallory & Co., 122 F.2d 98 (3d Cir. 1941), plaintiff arrested the ship on a maintenance and cure cause of action brought *in rem* and attached the ship on a Jones Act cause of action brought *in personam*. Both seizures were upheld over de-

fendant may, of course, be attached,[57] as may a vessel being purchased by defendant under a conditional sales contract.[58] However, a vessel in defendant's possession as a demise or bare boat charterer may not be attached because title is unconditionally in the owner.[59]

Intangible property of the defendant in the hands of third parties, such as bank accounts, insurance proceeds,[60] and sub-freights,[61] may be attached, although credits in the hands of the United States have been held immune from garnishment.[62]

As is true of the action *in rem*, there can be no attachment of real property owned by defendant because real property does not fall within the definition of "goods and chattels or credits and effects."[63]

C. *Time, Place, Method, and Notice of Seizure*

A complaint *in rem* must describe the property to be seized and must state "that it is within the district or will be during the pendency of the action."[64] There is, therefore, no requirement that the property be within the district at the time of filing of the complaint.[65] Process

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fendant's objection that there could be no arrest of a vessel *in rem* for a Jones Act claim because, as the court held, the attachment of the vessel was not an *in rem* proceeding.

[57] In Lewis v. Maritime Overseas Corp., 163 F. Supp. 453 (D. Ore. 1958), it was held that admiralty had jurisdiction of a longshoreman's *in personam* suit where he was injured on the *Ocean Deborah* and attached another vessel of the same owner, the *Ocean Evelyn*. But attachment of a vessel does not cover rented equipment not owned by defendant or necessary for the vessel's operation. W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., 95 F. Supp. 249 (E.D.S.C. 1951).

[58] Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265 (2d Cir. 1929).

[59] McGahern v. Koppers Coal Co., 108 F.2d 652 (3d Cir. 1940). Nor can the charterer's contract rights in the vessel be attached. Applewhaite v. S.S. Sunprincess, 136 F. Supp. 769 (N.J. 1956).

[60] *Cf.* Federazione Italiana, D.C.A. v. Mandask Compania D.V., 158 F. Supp. 107 (S.D.N.Y. 1957), where attachment of hull insurance proceeds failed because defendant could be "found" in the district. See Procter & Gamble v. Tank Barge Fred E. Haslea, 1934 A.M.C. 1481 (S.D.N.Y. 1934) regarding attachment of liability insurance policies.

[61] Bienvenido Shipping Co. v. Subfreights of S.S. Andora, 168 F. Supp. 127 (E.D.N.Y. 1958).

[62] Chilean Line, Inc. v. United States, 344 F.2d 757 (2d Cir. 1965); The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946).

[63] Miller v. United States, 78 U.S. (11 Wall.) 268 (1870); Harriman v. Rockaway Beach Co., 5 Fed. 461 (E.D.N.Y. 1880).

[64] Fed. R. Civ. P. Adm. Supp. C(2).

[65] Pacific Coast S.S. Co. v. Bancroft Whitney Co., 94 Fed. 180 (9th Cir. 1899), *rev'd. on other grounds sub nom.* Queen of the Pacific, 180 U.S. 49. Filing of the complaint *in rem* is a commencement of the action within the one year period of limitation prescribed by Carriage of Goods by Sea Act although process not issued until after statutory period. Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955); United Nations v. SS. Mormacmail, 99 F. Supp. 552 (S.D.N.Y. 1951).

in rem may be held in abeyance if plaintiff so requests.[66] This is often done when the shipowner has agreed to give security in lieu of arrest of his vessel.[67] Where plaintiff has filed suit both *in personam* and *in rem*, but has not seized the vessel, he may later seize it, even while an appeal is pending, if circumstances change and thus perfect the *in rem* action.[68]

Process for attachment may also be held in abeyance.[69] As a practical matter, though, if the location of property of defendant is known, attachment should not be delayed because, as will be further discussed,[70] an entry of personal appearance by defendant before attachment will defeat attachment altogether.

Regarding place of seizure, Supplemental Rule E provides that process either *in rem* or by attachment "shall be served only within the district." In general, the maritime boundaries of a district are determined by the maritime boundaries of the state in which the district is located.[71] For example, the far shore of a river,[72] the thread of a river,[73] the middle of a lake,[74] the international boundary line,[75] and a marine league (3 statute miles) from shore[76] may mark the maritime boundaries of a district.

It is proper for the marshal to seize a vessel which is passing through the waters of the district and which does not intend to stop within the district.[77] In *Witham v. The James E. McAlpine*,[78] a vessel

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66 Fed. R. Civ. P. Adm. Supp. E(3)(b).

67 Anglo American Grain Co. Ltd. v. S/T Mina D'Amico, 169 F. Supp. 909 (E.D. Va. 1959).

68 Grauwiller Transp. Co. v. Exner Sand & Gravel Corp., 162 F.2d 90 (2d Cir. 1947). But beware of laches. By the same token release of a vessel without bond pending an appeal vacates that *in rem* appeal, there being no *res*. The Manuel Arnus, 141 F.2d 585 (5th Cir. 1944).

69 Fed. R. Civ. P. Adm. Supp. E(3)(b).

70 See Defenses and Countermeasures, *infra*.

71 Devoe Mfg. Co., 108 U.S. 401 (1883). For an exception see note 83, *infra*.

72 Boundary of Kentucky is north shore of Ohio River. Walker v. Felmont Oil Corp., 240 F.2d 912 (6th Cir. 1957).

73 Thread of Mississippi River is boundary between Mississippi and Louisiana. Anderson Tully Co. v. Tingle, 166 F.2d 224 (5th Cir. 1948).

74 Middle of Lake Michigan is boundary between Michigan and Wisconsin. Michigan v. Wisconsin, 272 U.S. 398 (1926).

75 Northern boundary of Ohio is International Boundary Line running through Lake Erie. Edson v. Crangle, 62 Ohio St. 49, 56 N.E. 647 (1900).

76 State of Alabama; First National Bank in Greenwich v. National Air Lines, Inc., 288 F.2d 621 (2d Cir. 1961).

77 The so-called "right of innocent passage" does not prevent arrest of a vessel. See Republic of Panama v. United States, 1933 A.M.C. 1662 (General Claims Commission U.S. and Panama 1933).

downbound in the St. Clair River (which divides the United States and Canada) was arrested by *in rem* process abreast of St. Clair, Michigan in American waters. The master was ordered by the marshal to proceed to Detroit, a four hour run, and to dock at a designated place. However, security arrangements were made over radiotelephone for release of the vessel, and she was permitted to proceed. Her owner then moved for dissolution of the seizure on the ground that valid admiralty process contemplated the capability of the marshal to take full custody of the property seized which in this case he could not do because he was not a navigator. The court held that the arrest was valid because it took place within the territorial jurisdiction of the district and that if the master had refused to comply with the marshal's orders, the marshal could have called upon the United States Coast Guard to execute his orders.[79] The filing of a stipulation for release of a vessel which has been seized cannot confer jurisdiction,[80] nor can jurisdiction be stipulated if the vessel is at no time within the jurisdiction during the pendency of process.[81]

In the attachment cases, the question arises as to the proper place to attach the defendant's bank account. In the adjoining Southern and Eastern Districts of New York, it was for a time permissible for a plaintiff who could have obtained personal service on the defendant in the Southern District to file suit *in personam* in the Eastern District where defendant could not be "found," and then to attach defendant's bank account deposited in a Manhattan (Southern District) bank by notice of garnishment served upon a branch of the Manhattan bank located in the Eastern District. Choosing the forum which makes attachment possible is not considered an abuse of process,[82] and has been countenanced on the ground that service on the garnishee within the district was proper regardless of the situs of the debt.[83] However, in *Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*,[84] it was

[78] 96 F. Supp. 723 (E.D. Mich. 1951).

[79] In Tampa Tugs & Towing, Inc. v. M/V Sandager, 242 F. Supp. 576 (S.D. Calif. 1965), service of process *in rem* upon tugs engaged in towing a burning vessel was upheld.

[80] In The Hungaria, 41 F.2d 109 (D.S.C. 1889), seizure by the marshal of a vessel as she lay at anchor 4½ miles from shore was invalidated because the vessel was outside the territorial limit of South Carolina, the limit being the high water mark of the Atlantic Ocean.

[81] Puget Sound Stevedore Co. v. United States, 287 Fed. 751 (W.D. Wash. 1923).

[82] Shamrock Towing Co. v. Mfrs. & Merchants Lighterage Co., 262 Fed. 844 (E.D.N.Y. 1918); Cavanaugh v. Starbuck Towing Corp., 261 Fed. 656 (E.D.N.Y. 1919).

[83] Konstantinidis v. The S.S. Tarsus, 196 F. Supp. 433 (E.D.N.Y. 1961); *cf.* Miravalles Compania Naviera v. The Nissho Co. Ltd., 207 F. Supp. 716, 717 (E.D.N.Y. 1962); Patel Cotton Co. Ltd. v. Steel Traveler, 108 F. Supp. 595 (S.D.N.Y. 1952).

[84] 341 F.2d 50 (2d Cir. 1965).

held that under New York law the situs of a debt owed by a branch bank was the location of the branch bank and because defendant's account was in a Manhattan bank (Southern District), it could not be attached within the Eastern District.[85]

The physical means of seizure by the marshal of both tangible and intangible property is described in more detail under the new rules[86] than under the old rules. If it is practicable for the marshal to take actual possession of tangible property, he must do so; if actual possession is impracticable, the marshal must affix a copy of the process to the property in a conspicuous place[87] and leave a copy of the complaint and process with the person in charge. If intangible property is involved, the marshal must leave a copy of the complaint and process with the garnishee or obligor.

Under the new practice, notice requirements in an *in rem* proceeding have been liberalized. The former rules require the marshal after arrest of the property to give public notice thereof by newspaper, but as the Advisory Committee on the new rules noted,[88] this was expensive and unnecessary when the owner entered his appearance promptly after seizure and arranged for release of his property.[89] Supplemental Rule C(4) provides for notice only in the event that the property is not released within ten days after execution of process.

Under the former rules, no notice was required in an attachment proceeding. But under Supplemental Rule B(2) no judgment by de-

[85] A variation arose in Ships & Freights, Inc. v. Farr Whitlock, 188 F. Supp. 438 (E.D.N.Y. 1960). The court there recognized that because jurisdiction of the Eastern District of New York defined in 28 U.S.C. § 112(c) includes "concurrently with the Southern District, the waters within the counties of Bronx and New York," it is possible to file a complaint *in personam* in the Eastern District against a shipowner who can be found in the Southern District but not in the Eastern District and then obtain an attachment of a vessel berthed within the Southern District. See Merritt-Chapman & Scott Corp. v. Marine Transit Corp., 1930 A.M.C. 1294 (E.D.N.Y. 1930). But the court in Ships and Freights, Inc., *supra* held that a plaintiff cannot by these means attach bank funds in Manhattan since the funds are neither within the Eastern District nor in the "waters" of Bronx or New York counties.

[86] Fed. R. Civ. P., Adm. Supp. E(4)(b) and (c).

[87] In Yokahama Specie Bank v. Chengting T. Wang, 113 F.2d 329 (9th Cir. 1940), a possessory action was filed against scrap iron aboard a Republic of China vessel. The marshal handed a copy of the libel to the senior officer present, attached copy thereof to a bulkhead in the saloon and had an interpreter read the process to the Chinese crew. The seizure was held invalid because process was not attached to the cargo and because no one took charge of the cargo.

[88] See 39 F.R.D. 153.

[89] *Cf.* San Rafael Compania Naviera, S.A. v. American Smelting & R. Co., 327 F.2d 581 (9th Cir. 1964). Costs of publication of notice came to $12,000.00.

fault may be entered except upon proof of notice, or attempted notice, to defendant.

D. *Release of Property*

Nothing short of news of a major marine disaster is likely to shock and dismay the shipowner more than news that his ship has been seized. The ship, as a profit-making machine, must be kept moving. When it is idle, expenses mount, future cargoes may be lost, and charter party penalties may be imposed.

It is, therefore, imperative that the vessel be released without delay. This is initially a matter of negotiation between the owner's attorneys and attorneys for the plaintiff. When the vessel is one of a fleet of United States flag vessels owned by a company of good financial repute whose vessels regularly call at the port of seizure, or are confined in their trade to a particular locality by the nature of their construction,[90] little is to be gained by a seizure of the vessel in the first place; action *in personam* with service upon the owner should suffice. However, if such a vessel is seized, the parties should be able to agree to her release upon minimum assurances—at most a letter from the owner's insurance broker showing adequate insurance in force.

Even if the particular seizure presents a situation where the means of collectibility are not so obvious, it is nevertheless common practice for the parties to agree to the release of the vessel upon the promise of counsel for the owner that he will promptly cause to be delivered to plaintiff or to the court a so-called Letter of Undertaking or Undertaking to Abide Decree. Such an undertaking is set forth in the opinion in *Continental Grain Co. v. Barge FBL-585*,[91] and may be issued by the owner or by an authorized representative of the owner's underwriters, either to avoid a threatened seizure or to obtain release from seizure. Typically, the undertaking is an agreement that in consideration of plaintiff's refraining from seizure (or, after a seizure, agreeing to a release) of the vessel, the owner or his underwriters shall enter an appearance, shall make claim acknowledging ownership of the vessel, and shall, whether the vessel be lost or not, pay any final decree which may be rendered against the vessel, reserving, however, all rights and defenses.

The attractiveness of such an agreement to the shipowner is, of course, that he avoids the expense of bond premiums which, including

[90] *E.g.*, the conventional Great Lakes bulk carrier.

[91] 364 U.S. 19, 29 (1960). See also 2 Benedict, Admiralty § 368 591 (6th ed. 1940) (Form 255).

renewals during the pendency of the case, may become sizeable.[92] The agreement may be attractive to plaintiff because it avoids the risk that plaintiff may have of ultimately paying the premiums on a release bond as would ordinarily be the case if he insists on a bond and the suit fails.[93] Also, experienced counsel may have come to know various underwriting and mutual insurance associations and know that these associations honor their commitments.

Nevertheless there are situations where the *dramatis personae* in a seizure are strangers to each other and where the wrong decision regarding the terms of release will appear to be without remedy. In such circumstances counsel should insist on the posting of bond by the owner of the property. If the parties cannot agree upon the amount of the bond, then under Supplemental Rule E(5)(a) the court will fix the bond at an amount "sufficient to cover the amount of the plaintiff's claim fairly stated" with interest at 6 percent and costs; but the bond will not exceed (1) twice the amount of plaintiff's claim, or (2) the appraised value of the property, whichever amount is smaller.[94]

Upon filing of a surety bond or lesser stipulation or other security[95] approved by plaintiff or his attorney authorizing release of the property and upon payment of court costs, the property in the custody of the marshal will be released[96] subject, in the case of a vessel, to clearance by the Collector of Customs.[97]

The giving of a bond does not waive objection to the Court's jurisdiction over the subject matter,[98] or waive the objection, either in cases *in rem* or of attachment, that the seizure was unlawful.[99] Furthermore, the giving of a bond and the later filing of responsive pleadings by the

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[92] See note 41, *supra.*

[93] See note 42, *supra.*

[94] See Advisory Committee's note, 39 F.R.D. 159. The rule modifies 28 U.S.C. § 2464 in the light of The Lotosland, 2 F. Supp. 42, 43 (E.D.N.Y. 1933), where the court held that strict interpretation of the statute "would make necessary, for instance, in a libel involving a personal injury case, by setting forth damage in any ridiculous figure whatsoever, the filing of a stipulation or bond in double the amount, no matter how slight the actual injury or damage might have been. Such, certainly, could not have been the intention of the framers of the section . . . ." *Cf.* Konstantinidis v. Denizcilik Bankasi, 307 F.2d 584 (2d Cir. 1962).

[95] 6 U.S.C. § 15, authorizes in lieu of a surety bond the depositing of bonds or notes of the United States having par value equal to amount of surety bond.

[96] Fed. R. Civ. P., Adm. Supp. E(5)(c).

[97] Fed. R. Civ. P., Adm. Supp. E(4)(b). Todd Shipyards Corp. v. City of Athens, 83 F. Supp. 67 (D. Md. 1949).

[98] The Iquitos, 286 F. 383 (W.D. Wash. 1921).

[99] See notes 76 and 78, *supra.* However, filing of claim and answer accomplishes such a waiver. The Rosalie M., 12 F.2d 970 (5th Cir. 1926).

owner of the property does not confer personal jurisdiction over the defendant in an *in rem* action.[100] The bond or stipulation for value stands in place of the property seized,[101] and discharges the lien thereon so that the property cannot be arrested again in the same proceeding.[102]

The owner of property seized is, of course, not required to give bond,[103] but if he does not, the property arrested or attached will remain in custody and under certain circumstances may be sold prior to determination of liability.[104]

An exception to the rule that property will be released by the giving of a sufficient bond exists in the case of actions *in rem* which are in the nature of possessory, petitory, or partition actions;[105] that is, actions brought to determine the right to possession,[106] to try title, or to liquidate part ownership. In *Panaghia Kathariotisa*,[107] where the libel was *in rem* for possession of the vessel, the trial court ordered release of the vessel upon filing of a bond. This action was reversed on appeal because the order in effect denied, without hearing on the merits, plaintiff's prayer for relief, which was for possession of the vessel. This decision does not appear to have been fully met by Supplemental Rule E(5)(d) which without qualification makes possible the release of property in these special actions "by order of the court."

E. *Defenses and Countermeasures*

The owner or garnishee of property attached, or about to be attached, by process *in personam* and the owner of property arrested by process *in rem* have formidable defenses and measures of retaliation in cases of both wrongful seizure and lawful seizure.

1. Avoidance of Attachment by Prior Personal Appearance

The prerequisite of the remedy of attachment of defendant's property is, of course, that defendant "shall not be found within the

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100 J. K. Welding Co. v. Gotham Marine Corp., 47 F.2d 332 (S.D.N.Y. 1931); *contra*, Mosher v. Tate, 182 F.2d 475 (9th Cir. 1950).

101 The Palmyra, 25 U.S. (12 Wheat.) 1, 10 (1827); The Steamer Webb, 81 U.S. (14 Wall.) 406, 418 (1871); United States v. Ames, 99 U.S. 35 (1878); Morrissey v. SS A&J Faith, 238 F. Supp. 877 (N.D. Ohio 1964).

102 *In re* National Motorship Corporation, 96 F.2d 88 (2d Cir. 1938); Pacific Vegetable Oil Corp. v. S.S. Shalom, 249 F. Supp. 503 (S.D.N.Y. 1966).

103 *Supra* note 98.

104 Fed. R. Civ. P., Adm. Supp. E(9)(b).

105 See Fed. R. Civ. P., Adm. Supp. D.

106 See as to ousting of sit-down strikers, Korthinos v. Niarchos, 175 F.2d 730 (4th Cir. 1949).

107 165 F.2d 430 (3d Cir. 1948).

district,"[108] so if an alert (or clairvoyant) defendant suspects that he is about to be sued in a district where he has assets but no presence, he can defeat attachment by promptly having his attorney make an entry of appearance.[109] In *The Valmar*[110] the defendant's attorney, anticipating an attachment of defendant's vessel, advised the marshal's office before the filing of suit where defendant, a non-resident, would be available for service within the district and thus defeated attachment.

2. Dissolution of Attachment on Ground That Defendant Can Be "Found" Within the District

The principal burden of establishing that defendant cannot be found within the district is upon plaintiff.[111] Although the former rules did not require from plaintiff a special affidavit on the subject of his knowledge of defendant's whereabouts, plaintiff could not properly withhold knowledge thereof from the marshal and thereby leave the problem of service entirely to the diligence of the marshal. In *Federazione Italiana D.C.A. v. Mandask Compania D.V.*,[112] the complaint was *in personam* for cargo loss, with prayer for attachment on the proceeds of hull insurance payable to defendant as owner of the vessel involved. The marshal made no inquiries regarding the presence of defendant within the district, and attached credits of over 1,000,000 dollars in a Manhattan bank. Despite the fact that defendant was not listed in telephone or building directories and did not display its name on its office door, plaintiff's attorney knew that the president of defendant had an office in the district from which most of defendant's business was conducted, and yet he did not so inform the marshal. Defendant's motion to vacate the attachment was granted on the ground that plaintiff had made no bona fide effort to locate defendant in the district.

Even though the present rules put the burden of disclosure upon plaintiff, this does not mean that the marshal is entitled to automatically attach defendant's goods. Supplemental Rule E(4)(a) provides that after issuance of process for attachment the marshal shall, "when it appears that the defendant cannot be found within the district" execute the process. Thus, it seems that the marshal would be required to make the inquiries which are normal for personal service

108 Fed. R. Civ. P., Adm. Supp. B(1).

109 2 Benedict, Admiralty § 290 (6th ed. 1940).

110 38 F. Supp. 615 (E.D. Pa. 1941); Coastal Marine Service of Texas, Inc. v. Zeeland Transp., Ltd., 154 F. Supp. 252 (D. Md. 1960); Cocotos Steamship of Panama v. Sociedad Maritime Victoria, 146 F. Supp. 540 (S.D.N.Y. 1956).

111 Fed. R. Civ. P., Adm. Supp. B(1).

112 158 F. Supp. 107 (S.D.N.Y. 1957).

in any case. If from such inquiries it *appears* that defendant cannot be found, he may attach. The marshal is not required to make an unusual effort or to conduct a "fine-toothed comb" search for defendant.[113] Thus, the validity of the attachment should not turn upon the actual facts as they may be disclosed by defendant after attachment, but instead upon plaintiff's knowledge and the marshal's knowledge, after reasonable inquiry, prior to attachment.[114]

The real problem is that proper service upon the defendant is becoming easier. In *United States v. Cia. Naviera Continental S.A.*,[115] defendant moved to vacate attachment of one of its vessels which was seized under a complaint *in personam* for breach of charter party. Referring to the former pertinent admiralty rule, the court stated:[116]

> The rule does not define "found." The term has a different significance depending whether the respondent is a resident or a nonresident. In the case of a foreign respondent, such as we deal with here, whether or not it can be found within the district presents a two-pronged inquiry: First, whether it can be found within the district in terms of jurisdiction, and, second, if so, whether it can be found for service of process.

The court held that the first test depended upon the extent of defendant's activities within the district, while the second test depended upon the presence of "an officer, a managing or general agent" or other responsible representative of defendant within the district who could be served. Since the evidence showed that plaintiff had made no inquiries at all regarding defendant's presence within the district, and since defendant's affidavits showed the presence in the jurisdiction of a managing agent of defendant who signed the subject charter parties and who conducted substantial business for defendant in the district, the court dissolved the attachment.

In *Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*,[117] the defendant had its principal office in the Southern District of New York. Plaintiff sued *in personam* in the Eastern District of New York and the marshal, without actually attempting personal service, attached credits in a branch bank of Manufacturers Hanover Trust, located in Brooklyn. Upon defendant's motion the attachment was vacated on three grounds, two of them pertinent here: (1) defendant had a terminal and claims agent located within the Eastern District and was, therefore, subject to personal service; and (2) since the former ad-

113 Seawind Compania S.A. v. Crescent Line, Inc., 320 F.2d 580, 583 (2d Cir. 1963).
114 *Ibid.*
115 178 F. Supp. 561 (S.D.N.Y. 1959).
116 *Id.* at 563.
117 341 F.2d 50 (2d Cir. 1965).

miralty rules made no provision for the method of service, service could be made under Rule 4(f) of the Federal Rules of Civil Procedure which permits service anywhere within the state; therefore defendant, who could have been served in the Southern District of New York, could be "found" within the Eastern District. On appeal, the court of appeals affirmed vacation of the attachment upon ground (1), but expressly refrained from ruling upon ground (2).[118]

However, in *Chilean Line Inc. v. United States*,[119] the same court of appeals approved ground (2) and, in fact, extended it. There complaint was filed in the Southern District of New York against a ship repair company that was a New York corporation, but which had no office in the Southern District. The clerk refused to issue process for attachment of credits in the hands of the United States alleged to be owed to the ship repair company, and the trial court denied a motion to compel issuance of process. In affirming, the court of appeals held that the ship repair company could be "found" within the Southern District because (1) as a New York corporation, it was subject to personal jurisdiction within the requirements of due process of law, and (2) it was subject to process in admiralty by two of the various methods allowed by Rules 4(c), (d), (e) or (f) of the Federal Rules of Civil Procedure. Under Rule 4(f) a district court may issue process anywhere within the territorial limits of the state, and under New York law, which is made applicable by Rule 4(d)(7), a New York corporation can be served simply by serving the Secretary of State. Thus, the court held that regardless of where in the state its principal office was located, the New York corporation could be "found" within the district by two methods of service.

The ruling in *Chilean Line Inc. v. United States*[120] has not been included in the body of Supplemental Rule B. As under the former admiralty rule, no definition of "found within the district" has been attempted. In all probability, the rule was formalized beyond recall before the decision in *Chilean Line Inc.* could be considered. Nevertheless, it is clear from the remarks of the Advisory Committee which drafted the Supplemental Rules that the Committee intended to reject any restriction of the attachment remedy based on the grounds later espoused in *Chilean Line Inc.* Specifically, it is clear from the Committee's remarks concerning Supplemental Rule B that by retaining, on the one hand, the phrase "found within the district" and, on the other hand, by omitting in the same context the right of statewide

118 *Ibid.*

119 344 F.2d 757 (2d Cir. 1965).

120 *Ibid.*

service under rule 4(f), the Committee intended to "enlarge the class of cases" in which the attachment remedy could be used and intended to permit its use whenever a reasonable attempt to serve defendant *literally* "within the district" would fail. The Advisory Committee's note states:

> A change in the context of the practice is brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district. The Advisory Committee considered whether the rule on attachment and garnishment should be correspondingly changed to permit those remedies only when the defendant cannot be found within the state and concluded that the remedy should not be so limited.
>
> The effect is to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person of the defendant may be independently obtained. This is possible at the present time where, for example, a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction . . . or where, though the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, there is in the district no officer on whom process can be served . . . .[121]

This unified expression of intention by this committee of experienced admiralty attorneys, speaking as they did for all interests in the maritime community, should have in the future a "highly persuasive"[122] effect on construction of the phrase "found within the district."

Unfortunately, however, it appears that the court in *Chilean Line Inc.* had before it an advance publication of the note of the Advisory Committee quoted above, but nonetheless reached exactly the opposite conclusion from that urged by the Committee. The court said:

> the advisory committee . . . notes that while the doing business test will continue to be applied on a case to case basis, . . . Rule 4(f) will enable summons to be served on the defendant throughout the state . . . . We think that we may well hold that 'found within the district' . . . should today be held to encompass the situation here.[123]

This holding, of course, restricted the scope of the attachment remedy while the note of the Advisory Committee "concluded that the remedy should *not* be so limited. The effect is to *enlarge* the class of cases in which the plaintiff may proceed by attachment."[124]

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121 39 F.R.D. 148 (1966).

122 2 Moore's Federal Practice § 1.13(2), (2d ed. 1965); Fourco Glass Co. v. Transmirra Corp., 353 M.S. 222, 227-28 (1957).

123 344 F.2d at 761.

124 *Supra* note 114.

If we have interpreted the remarks of the Advisory Committee correctly, it would also appear to be a logical extension thereof that just as the Committee did not intend to restrict the attachment remedy by the possibility under Rule 4(f) of state-wide service outside "the district," the Committee likewise did not intend to restrict the remedy by the possibility *under state law*, as implemented by rule 4(d)(7), of service outside "the district." The latter possibility was, of course, the second method of service assigned in *Chilean Line Inc. v. United States*[125] as a reason for vacating the attachment; namely, the fact that defendant as a domestic corporation could be served under rule 4(d)(7) in any manner permitted by New York law and under New York law service on a domestic corporation could be made by service on the Secretary of State. As service on the Secretary of State of New York at Albany would be as much outside "the district" as service at some place of business of defendant in New York state outside "the district," neither method of service should, under this interpretation of the intention of the Advisory Committee, be sufficient to defeat attachment.

Related to the problem of service under state law outside "the district" is the problem presented by the so-called state "long-arm" statutes; specifically, in the maritime field, those laws referred to as "non-resident watercraft statutes."

Typically, such a statute provides, in substance, that operation by a non-resident of a watercraft upon the waters of the state constitutes appointment of the Secretary of State to accept service of process on behalf of the non-resident in any action against him "growing out of any accident or collision in which said nonresident may be involved . . . on the waters of the state. . . ."[126]

The validity of these statutes has been uniformly upheld.[127] They provide an effective remedy against a citizen non-resident, but appear to have limited effectiveness when the non-resident watercraft owner is an alien since judgment against him is not entitled to full faith and credit in an alien court. Suppose that a maritime suit *in personam*, with prayer for attachment is filed against an alien non-resident watercraft owner on a cause of action arising out of the activity described by such a statute. The question is then whether an attachment of the alien

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[125] 344 F.2d at 761.

[126] Ohio Rev. Code Ann. § 1547.36 (Page 1953).

[127] Valkenburg K.G. v. S.S. Henry Denny, 295, F.2d 330 (7th Cir. 1961) (Illinois Statute); Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962) (Virginia Statute); S.S. Philipine Jose Abad Santos v. Bannister, 335 F.2d 595 (5th Cir. 1964) (Louisiana Statute); Leport v. White River Barge Line, 315 F.2d 129 (3d Cir. 1963) (Pennsylvania Statute); Ingravallo v. Pool Shipping Co., 247 F. Supp. 394 (E.D.N.Y. 1965) (New York Statute).

non-resident's property "within the district" may be vacated under the state statute because of the availability of substituted service on the Secretary of State outside "the district." Can the defendant thus "be found within the district"? In light of the Advisory Committee's note, the answer may be "no". But courts under the sway of *Chilean Line Inc v. United States*[128] might think otherwise and dissolve the attachment. In doing so, however, they would be tendering to plaintiff, in place of the powerful remedy of attachment, the relatively futile remedy furnished by the absent watercraft-owner's statute; they would be guilty of offering "a promise to the ear to be broken to the hope."[129]

3. Defenses of the Garnishee

In the event the goods or credits attached are not in fact the property of the defendant, the garnishee or defendant should be able to raise this defense at once by a motion to vacate the attachment. In *Galban Lobo Trading Co. v. The Diponegaro*,[130] the court appointed a commissioner to determine ownership of the credit and the amount thereof. In *Cushing v. Laird*,[131] the Supreme Court, after protracted litigation, determined the ownership of funds derived from sale of a Confederate vessel by a prize court.

When the attached goods or credits belong to defendant, the garnishee is entitled to setoff therefrom a claim he may have against defendant[132] even when the setoff is non-maritime.[133]

Plaintiff is entitled to file interrogatories to be answered by the garnishee, and the garnishee must file answer thereto as well as an answer to the complaint. If the garnishee admits a debt owing to the defendant, the court may order it paid into the registry of the court. Also, the garnishee may retain control of the debt subject to order of the court,[134] or he may voluntarily pay the funds into court.[135]

4. Retaliation by Counterclaim and a Demand for Cross-Security

Continuing the former admiralty practice, Supplemental Rule E(7) requires, unless the court otherwise directs, that when a defendant

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128 *Supra* note 117.

129 Farrell v. United States, 336 U.S. 511, 516 (1949).

130 103 F. Supp. 452 (S.D.N.Y. 1951).

131 107 U.S. 69 (1882).

132 San Rafael Compania Naviera, S.A. v. American Smelting & R. Co., 327 F.2d 581 (9th Cir. 1964).

133 Wilhelmsens D.A.S. v. Canadian Venezuelan Ore. Co., 224 Fed. 881 (2d Cir. 1915).

134 Fed. R. Civ. P., Adm. Supp. B(3)(a); Defense Plant Corp. v. United States Barge Lines, 145 F.2d 766 (2d Cir. 1944).

135 Fed. R. Civ. P., Adm. Supp. E(4)(c).

who "has given security to respond in damages" files a counterclaim, the plaintiff shall give security to respond in damages to the counterclaim; until plaintiff does so, the original action shall be stayed.[136] The normal effect of this rule is to assure to the defendant who has "given security" and who has a proper maritime counterclaim against plaintiff[137] that he will have all the security for his counterclaim which an actual seizure of plaintiff's property would have given him. In reality, the rule bestows on defendant all the fruits of the *in rem* and attachment remedies even in situations where neither remedy would be available to him.[138]

This rule is highly advantageous to defendant in the most common situation giving rise to a counterclaim—collision between ships. Depending on the trade routes of plaintiff's ship, seizure *in rem* may be impossible within the jurisdiction where plaintiff has brought suit or, in other cases, within *any* United States jurisdiction. Of course, when plaintiff's ship is sunk in the collision, no seizure anywhere can be made.[139] Furthermore, the defendant who "has given security" is accorded the same cross-security for his counterclaim which an attachment of plaintiff's goods and credits would have given him despite the fact that attachment is never available to him as a remedy within the jurisdiction of plaintiff's suit.[140]

The main source of controversy in this rule is the requirement that before defendant may have cross-security on his counterclaim, he must have "given security to respond in damages." Is it enough if defendant, without the compulsion of seizure or threatened seizure of his property, *voluntarily* posts security for plaintiff's claim as a pretext for obtaining cross-security? The Supreme Court in *Washington-Southern Co. v.*

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136 Although the rule does not say so, a demand for security should be made in the counterclaim. 2 Benedict, Admiralty § 332 (6th ed. 1940).

137 The counterclaim must arise ". . . out of the same transaction or occurrence with respect to which the action was originally filed. . . ." Fed. R. Civ. Proc., Adm. Supp. E(7).

138 Because of the statement in Spriggs v. Hoffstat, 240 F.2d 76, 78 (4th Cir. 1957) to the effect that there is a split of authority whether the cross-security rule applies where the counterclaim is *in personam* rather than *in rem* the counterclaim should, whenever possible, be lodged *in rem*.

139 A Government vessel is immune from seizure, but in The Gloria, 267 Fed. 929 (S.D.N.Y. 1919), defendant's motion for stay of the complaint until the Government gave security on defendant's counterclaim was granted. Yet, in the court's discretion, such a requirement may be waived. Charles Kurz & Co. v. South Carolina State Highway Dep't, 242 F.2d 799 (4th Cir. 1957).

140 Plaintiff having made personal appearance by the filing of his complaint is "found within the district." Seminole Lumber & Export Co. v. Bronx Barge Corp., 11 F.2d 982 (S.D. Fla. 1926).

Baltimore Co.,[141] held that such voluntary action by defendant does not entitle him to security on his counterclaim.

Also, does the mere act of arrest or attachment of defendant's property constitute the giving of security by defendant, or must defendant actually post security for release of his property? Although the problem was not directly presented to the Court in *Washington Southern Co. v. Baltimore Co.*,[142] there are intimations both ways in Justice Brandeis' opinion. The lower courts have likewise gone both ways. In *The Evangeline*,[143] the court held that the attachment of a vessel by process *in rem* constitutes "giving of security" although no release bond was given by defendant. The court in *Pan American Shipping Corp. v. Maritina*[144] held to the contrary. There the complaint was *in rem* for breach of time charter, with arrest of the vessel. No stipulation for value or other security was given for release of the vessel. Upon motion, after counterclaim was filed, the trial court ordered plaintiff to give cross-security or to show cause why the vessel should not be released and the original action stayed. The court of appeals reversed on the ground that the admiralty rule required defendant to post security and that arrest of the ship by plaintiff did not constitute giving of security by defendant. The court also stated that even if security had been given, the trial court's order was an abuse of discretion because the admiralty rule merely authorized staying of the action and did not authorize release of the vessel.[145]

Nonetheless, the court has broad discretion under Supplemental Rule E(7) which provides for cross-security "unless the court for cause shown shall otherwise direct." The action need not be stayed for refusal to post cross-security when plaintiff is impecunious or insolvent,[146] or where the counterclaim seeks damages which appear to be speculative or are disproportionate to the amount sought by plaintiff.[147]

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141 263 U.S. 629 (1924).

142 *Id.* at 633, 638, 639.

143 36 F.2d 426 (S.D.N.Y. 1929); *Cf.* Lochmore S.S. Co. v. Hagar, 78 Fed. 642 (E.D. Pa. 1897). See Partenreederei Wallschiff v. The Pioneer, 120 F. Supp. 525 (E.D. Mich. S. D. 1954), where the court offered to entertain a motion to require security from defendant after defendant seized plaintiff's vessel under a counterclaim *in rem*.

144 193 F.2d 845 (5th Cir. 1952); Owego, 289 Fed. 263 (W.D. Wash. N.D. 1923); City of Beaumont, 8 F.2d 599 (4th Cir. 1925).

145 *Contra*, Flota Maritima Browning De Cuba v. M/V Ciudad, 245 F. Supp. 205 (D. Md. 1965).

146 City of Beaumont, 8 F.2d 599 (4th Cir. 1925); Geotas Compania De Vapores, S.A. v. S.S. Arie H., 237 F. Supp. 908 (E.D. Pa. 1964); Seaboard & Caribbean Transport v. Hafen-Dampfschiffahrt, 329 F.2d 538 (5th Cir. 1964).

147 Spriggs v. Hoffstat, 240 F.2d 76 (4th Cir. 1957).

5. Damages for Wrongful Arrest or Attachment

Although the principle has often been stated by admiralty courts that damages will be awarded for wrongful seizure of property when the seizure is due to bad faith or gross negligence, there are few cases in which an award of damages has actually been allowed.[148] This is probably explained by the bad start made by the English judge who first considered the problem and established the precedent that even a clear maritime trespass with fatal results will not support a claim for detention damages.[149]

With such a precedent, it is not surprising that the right to damages under less serious conditions was slow to emerge. However, in *Gow v. William W. Brauer S.S. Co.*,[150] the court awarded 25 hours charter hire to a shipowner for the time his vessel was detained by the charterer's wrongful seizure because the account between them showed "according to any possible computation" that the charterer was, contrary to his sworn allegations, actually in debt to the shipowner. The court said:

> While the ordinary arrest of a vessel in a cause of damage, security for costs having been given by the libelant, is an inconvenience to which the owner is required to submit without a remedy, upon his success in the action, beyond the costs, yet where the libelant proceeds without an honest belief that he is using a rightful remedy, and his action is in the nature of a malicious prosecution, he should be held in any damages suffered by the shipowner through his wrongful act.[151]

Wrongful seizure induced by gross negligence is also actionable. In *Antinano v. W. R. Grace & Co.*,[152] damages for loss of a charter party arising from wrongful seizure were held recoverable where the vessel attached, instead of being a French wooden vessel 250 feet in length named Consuelo (the real culprit), was actually a Spanish steel steamship 350 feet in length named *Consuelo*. The court agreed that advice of counsel and the existence of an actual controversy were often sufficient to excuse a mistaken seizure, but found that this seizure was too careless.[153]

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148 6 Moore's Federal Practice § 54.77[2] (2d ed. 1965).

149 The English case is discussed in The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826). Detention damages were sought for the wrongful seizure of a vessel as prize. The seizure was made "after a sharp engagement" in which several seamen on each ship were killed. Damages were denied.

150 113 Fed. 672 (S.D.N.Y. 1902).

151 Id. at 674.

152 286 Fed. 702 (E.D. Va. 1923).

153 Those who deal in maritme commerce are charged with ". . . the knowledge as to

Even where the only mistake which induced the seizure appears to be a mistake in law, plaintiff has been threatened with an eventual award against him for damages, expenses and attorneys' fees.[154] Yet, extreme bad faith has resulted in no more than dissolution of the seizure and imposition of court costs.[155]

F. *Basic Priorities in the Fund Created by Arrest or Attachment*

We start with the assumption that as a result of the voluntary release of funds by a garnishee or by satisfaction of judgment by claimant or his sureties, or by judicial sale,[156] there exists a sum of money[157] in the registry of the court traceable to an original seizure or seizures of property. Some understanding of the ranking of maritime liens is necessary in order to avoid futile pursuit of a remedy.[158] In some situations there can be no conflict of priorities between "liens" of attachment and maritime liens because the property attached is not by nature subject to a maritime lien at all. Maritime liens can only attach to maritime property or its substitute, while an attachment "lien" can be applied to all goods and credits of defendant and can, therefore, be applied to

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the ownership and operation of a named ship which accepted maritime publications, as Lloyds Registry of Shipping would disclose." Valkenburg, K.G. v. S.S. Henry Denny, 295 F.2d 330, 333 (7th Cir. 1961).

[154] Hohenstein Shipping Co. v. Feliz Compania Naviera S.A., 236 F. Supp. 216 (E.D.N.Y. 1964).

[155] Former Rule 21 of the Southern District of New York provided that attachment may be vacated on a showing of "any improper practice or a manifest want of equity on part of libelant." See Maryland Shipbuilding & Dry Dock Co. v. Pacific Ruler Co., 201 F. Supp. 858 (S.D.N.Y. 1962); Skibs A/S Abaco, A., A. & N. v. Ardenshir B. Cursetjee & Sons, 133 F. Supp. 465 (S.D.N.Y. 1955); Shewan v. Hallenbeck, 150 Fed. 231 (S.D.N.Y. 1906), where plaintiff waited until a day when defendant was out of the district to bring suit and to make attachment.

[156] Not considered are the mechanics of judicial sale which is provided for in Fed. R. Civ. P., Adm. Supp. E(9). The procedural steps of sale are described by statute in the case of forfeiture (*e.g.*, 19 U.S.C. §§ 1605-1612; 28 U.S.C. §§ 2461-2465) and by local court rules in the case of interlocutory sale and under final decree. See 2 Benedict, Admiralty §§ 306-308 (6th ed. 1940); 3 Benedict, Admiralty §§ 447-449 (6th ed. 1940). Sale of a ship which is still loaded with cargo presents bidding difficulties. Morrisey v. S.S. A & J Faith, 238 F. Supp. 877 (N.D. Ohio E.D. 1964). It is suggested by The St. Paul, 271 Fed. 265 (2d Cir. 1912) that cargo must bear the cost of discharging.

[157] The fund available for distribution is first diminished by the charge for the marshal's costs, fees and expenses during custody. 28 U.S.C. § 1921. These may include such post-seizure expenses as wages of master or crew. *In re* Scott, 99 Fed. 404 (E.D.N.C. 1900); or wharfage, The St. Paul, 271 Fed. 265 (2d Cir. 1921); 3 Benedict, Admiralty § 449 (6th ed. 1940).

[158] The barest outline of this complex and unsettled subject appears at 1 Benedict, Admiralty § 11, 19 (6th ed. 1940). See Gilmore and Black, The Law of Admiralty 592-624 (1957).

non-maritime as well as to maritime property. Thus, when defendant's bank account is attached by process *in personam*, plaintiff's claim will not, except in unusual circumstances,[159] run into competition from maritime liens. Suppose, however, there are multiple attachments of the bank account *in personam*, and the fund is not large enough to satisfy all. In such a case the attachment which is made first in time has priority over later attachments.[160]

However, when maritime property—ship, freights, cargo—is attached by process *in personam*, plaintiff may be opposed by maritime lienors who will assert their liens by intervention in the attachment.[161] As against maritime lien holders, plaintiff's prior attachment has no effect[162] except that he stands last in line for payment. This is because the lien of attachment is not the same as a maritime lien; the latter is secret "with qualities of paramountcy," while the lien of attachment possesses no "quality of paramountcy."[163] Indeed, in *Jackson v. Inland Oil & Transport Co.*,[164] the attachment lien is referred to as a "quasi-lien" and was, in this case, not only subordinated to a maritime lien for repairs, but was also subordinated to a non-maritime purchase money mortgage which did not even comply with state law.[165]

Conclusion

Where the identity of the responsible party is unknown to the party wronged, or where the responsible party is known to reside overseas, the maritime remedies of arrest *in rem* or attachment *in personam* are indispensable means of redress in United States courts. Where the responsible party is personally accountable in some United States jurisdiction, these maritime remedies give the party wronged a wider choice of forum and greater security for his claim than under the common law. By the same token, there are defenses and countermeasures available to the defendant whose property is seized in ad-

[159] *E.g.*, if the bank account represented proceeds traceable to sale of a tortfeasor vessel.

[160] San Rafael Compania Naviera S.A. v. American Smelting & R. Co., 327 F.2d 581 (9th Cir. 1964). The case, however, raises the problem of how the debt could have a situs in two places; Esso Standard (Switzerland) v. The Arosa Sun, 184 F. Supp. 124 (S.D.N.Y. 1960).

[161] Kahn v. Niagara Laundry & Linen Supply Co., 10 F.2d 15 (6th Cir. 1926).

[162] San Rafael Compania Naviera S.A. v. American Smelting & R. Co., *supra* note 159. The case presents arrests and attachments of the same fund in two jurisdictions.

[163] Brown v. C. D. Mallory & Co., 122 F.2d 98 (3d Cir. 1941).

[164] 318 F.2d 802 (5th Cir. 1963).

[165] *Ibid.* Although the mortgage was not recorded in the manner required by state law, it was recorded with U.S. Customs as permitted by 46 U.S.C. § 921.

miralty which tend to equalize the situation and which would not be available at common law.

Even where these maritime remedies bring to bear the maximum pressure upon defendant they are less severe in their consequences than one of their ancestors, the formidable suit by "summons and distress infinite" described in *Manro v. Almeida.*[166] We have come far. Effective July 1, 1966, the remedy of "distress infinite" against the person was abolished in admiralty.[167] The remedies of arrest and attachment of property still remain, but the distress is not infinite.

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[166] 23 U.S. (10 Wheat.) 485, 489 (1825).

[167] Former Supreme Court Admiralty Rule 2 concerning suits *in personam* authorized that process "may be by a *simple* warrant of arrest of the person." This provision has been dropped from the Supplemental Rules. See Note of Advisory Committee, 39 F.R.D. 147 (1966).